91-361

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

VICKI LYNNE HOSKINSON, et al.,

Appellants,

vs.

STATE OF CALIFORNIA, et al.,

Appellees.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the doctrine of "purposeful availment" developed under the Due Process Clause of the Fourteenth Amendment by this Court's prior decisions, preclude the assertion of personal jurisdiction over a defendant whose intentional performance of a reckless and wanton act in an adjoining state has proximately caused the molestation and death of a child residing in the forum when:

(a) the injury in the forum state was the reasonably expected consequence of the defendants' misconduct;

(b) the forum state has strong and legitimate interests in providing a remedy for the victim's family; and,

(c) considerations of fair play and convenience overwhelmingly favor trial in the forum?

2. If the existing decisions preclude jurisdiction under the Fourteenth Amendment should those decisions be reconsidered?

3. Does the protection of individual liberty interests of "persons" under the Fourteenth Amendment Due Process Clause extend to the State of California in its governmental capacity or should the definition of "persons" so protected be more logically construed to protect only individuals seeking protection against wrongful state action?

LIST OF PARTIES

The parties to the proceedings below were, and the parties to this Petition for Certiorari are:

PETITIONERS:
Vicki Lynne HOSKINSON Through the Personal Representative of Her Estate, Robert FLEMING; Deborah Jane Carlson, Individually and as Surviving Parent of Vicki Lynne Hoskinson and George Glenn Carlson, Jr., Husband and Wife; Stephanie Dawn Hoskinson by Her Next Friend and Mother, Deborah Jane Carlson; Carie Lynn Carlson by Her Next Friend and Father, George Glenn Carlson; Brian William Carlson by His Next Friends and Parents, Deborah Jane Carlson and George Glenn Carlson, Jr., and Rodney Paul Hoskinson, Individually and as Surviving Parent of Vicki Lynne Hoskinson, Deceased, **(all were Plaintiffs/Appellants below)**

RESPONDENTS:
STATE OF CALIFORNIA; California Department of Corrections, a State Agency; California Board of Prison Terms; Robert McLean, Individually and in His Official Capacity, and Jane Doe McLean, Husband and Wife; Members of the California Board of Prison Terms, Individually and in Their Official Capacities; John Atwood and Alice Atwood, Husband and Wife; **(all were Defendants/Appellees below).**

PARTY BELOW WHO IS NOT A PARTY TO THIS PROCEEDING:
Frank Jarvis Atwood, **(a defendant in the trial court).**

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The opinion of the Arizona Supreme Court denying review is not yet reported in the official reporters. It is reported in Westlaw as Hoskinson v. State of Cal. ___ P.2d ___, 1991 WL 128407 (Ariz.), as 1991 Ariz. LEXIS 52 and is reprinted in the Appendix at pages 18-22. The opinion of the Arizona Court of Appeals in regard to which certiorari is sought here is not yet reported in the official reporters. It is reported in Westlaw as Hoskinson Through Fleming v. State of Cal. ___ P.2d ___, 1990 WL 202765 (Ariz.App.), 1991 Ariz.App. LEXIS 401 and is reprinted in the Appendix at pages 1-17. The minute entry of Judge Carruth in the Arizona Superior Court is not reported and is reprinted in the Appendix at pages 23-28.

JURISDICTION

The opinion of the Arizona Court of Appeals dated December 13, 1990 is contained in the Appendix at pages 1-17 and is the order sought to be reviewed here. A petition for review under Arizona procedure was timely filed on December 21, 1990. The Arizona Supreme Court denied review on July 9, 1991 by written order contained in the Appendix at pages 18-22. Petitioners believe that jurisdiction is conferred on this Court by Title 28 U.S.C. § 1257 which provides in pertinent part:

> *State courts; appeal; certiorari*
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

> Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The federal question raised by this case under the Fourteenth Amendment to the Constitution of the United States was specifically set forth in the initial motions to dismiss and have been the basis upon which each of the courts below have ruled.

CONSTITUTION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The California Government Code provides in Section 845.8:

> Parole or release of prisoner; escape of prisoners
>
> Neither a public entity nor a public employee is liable for:
>
> (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.
>
> (b) Any injury caused by:
>
> (1) An escaping or escaped prisoner;
>
> (2) An escaping or escaped arrested person; or
>
> (3) A person resisting arrest.

The California Penal Code provides in Section 3059:

> Leaving state without permission; escape
>
> If any paroled prisoner shall leave the state without permission of the Board of Prison Terms, he shall be held as an escaped prisoner and arrested as such.

STATEMENT OF THE CASE

This case involves the interpretation of the doctrines developed by this Court following its decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and in particular, the doctrine of "purposeful availment" that stems from this Court's decision in *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

The litigation arises out of the kidnapping, molestation and murder of eight-year-old Vicki Lynne Hoskinson of Tucson, Arizona, who died there on September 17, 1984 at the hands of a California parolee named Frank Jarvis Atwood who was released from prison following compeletion of his determinate sentence. The proximate cause of Vicki Lynne Hoskinson's death is alleged to be the intentional failure of the defendants, both individual and governmental, to exercise their specific duty to control the actions of Frank Jarvis Atwood who they knew to be a vicious, non-repentant child molester who had been administratively determined to be likely to cause harm to children if left uncontrolled. The State of California had, upon that determination, put Atwood into a parole classification known as "controls emphasis" which was designed to protect the public from the danger he posed to children. That protection was to be accomplished by various means described in the California Parole Procedures Manual. In addition, plaintiffs allege a range of legal obligations to control arising from the common law and the California Penal Code §3059, *supra*, p. 3. Instead of complying with those obligations, however, the defendants did virtually nothing. Frank Atwood was allowed to roam free and uncontrolled across the southwestern United States in clear violation of those obligations. On several occasions he found his way to Tucson, Arizona where he finally abducted, molested and murdered Vicki Lynne Hoskinson. The facts are spelled out in more detail in the dissenting opinion of Judge Hathaway in the Court below. (App. 10-17)[1]

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[1] Throughout this petition the citation to the Appendix will be "App. ___".

This suit was brought by the family of Vicki Lynne Hoskinson in Tucson. It was dismissed as to respondents here for want of personal jurisdiction under the Fourteenth Amendment to the Constitution of the United States because there was "no showing of any kind that the defendants' conduct was in any way purposefully directed toward Arizona." (App. 6) Plaintiffs below, petitioners here, did not allege that the defendants sent Frank Atwood to Tucson. Petitioners *do* allege, and the court below assumed for purposes of its decision, that the defendants "engaged in conduct which they should reasonably have expected would cause an effect in this state." (App. p.4) Notwithstanding that conclusion, the courts below held that personal jurisdiction could not be asserted consistently with the Fourteenth Amendment doctrine established by this Court.[2] The case arose in the following fashion.

After Frank Jarvis Atwood was arrested and charged, petitioners filed suit in the Arizona state courts against various individual defendants in their personal capacity and the State of California in its governmental capacity. The defendants removed the case to the United States District Court where, after considerable litigation, it was remanded as improvidently removed. In the state court

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[2] While the court below reached this opinion by reference to opinions of the Arizona Supreme Court as well as opinions of this Court, it is clear that both courts rely upon the federal constitutional doctrine established by this court in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny. *See, Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 269, 736 P.2d 2, 3 (1987).

the case proceeded to discovery on the jurisdictional issues raised by the defendants' motions to dismiss. Following the conviction of Frank Jarvis Atwood for the kidnapping and murder of Vicki Lynne Hoskinson, the trial court entered partial summary judgment against him on the question of liability. *See*, Ariz. Rev. Stat. §13-807 (Supp. 1989).

Thereafter, depositions of the other defendants were taken and extensive document production occurred. Upon the completion of discovery plaintiff filed a sixty-three paragraph Statement of Facts under Uniform Rule IV(f) summarizing the discovery.[3] The trial court did not hold an evidentiary hearing but on the pleadings and other papers found that the remaining defendants had not "purposefully availed" themselves of the "benefits of Arizona law" and on that basis dismissed for want of personal jurisdiction under the Fourteenth Amendment. On appeal the Arizona Court of Appeals affirmed by a vote of 2-1. On Petition for Review the Arizona Supreme Court denied review by a vote of 3-2.

The case is brought to this Court because the court below felt compelled by this Court's decisions to uphold dismissal of the suit brought by the parents and siblings of Vicki Lynne Hoskinson in the county of her residence and death on the ground that the individual defendants did not "purposefully" direct their reckless and wanton

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[3] Under Arizona law, those facts and all inferences reasonably drawn in petitioners' favor from them, comprise the factual record on appeal. *Corbin v. Challenge, Inc.*, 151 Ariz. 20, 23, 725 P.2d 727, 730 (App. 1986) is most often cited for this proposition.

conduct specifically toward Arizona. The court reached that conclusion even though those defendants, respondents here, "should have foreseen or did foresee that Atwood would travel to Arizona and sexually assault a child here" (App. 6), if they did not assert control over his actions. That disturbing result was not reached without considerable discomfort on the part of the judges at all three levels of the Arizona judicial system.

The trial judge expressed his view that he was bound by this Court's decisions requiring that the defendants purposefully "avail" themselves of the "benefits" of the forum state. He also concluded that the doctrine of jurisdiction by necessity was not applicable and that the State of California is a "person" entitled to claim the individual liberty protections of the Fourteenth Amendment. The trial judge decided a number of other issues which were not addressed in the subsequent appellate proceedings and, therefore, are not therefore before this Court. (App. 23)

The Arizona Court of Appeals split 2-1, with the dissenting judge writing an impassioned and factually detailed attack upon the doctrines that were deemed by the majority to compel such a seemingly spurious result. *Hoskinson v. State of California*, ___ P.2d ___ (1991). (App. 1) The majority, while expressing some disquietude, nevertheless held that expected harm in a foreseeable forum is not a sufficient jurisdictional predicate under this Court's decisions unless the conduct which is the proximate cause of the harm was "directed" to the forum. The court observed, however, that the contrary rule "[p]erhaps . . . should be the law. So far, it is not." (App. 9, footnote 4) The Court of Appeals also affirmed the trial

court's conclusion that the State of California was a "person" entitled to claim the individual liberty protections of the Fourteenth Amendment, that the doctrine of jurisdiction by necessity was not applicable and that "general jurisdiction" could not be asserted.

The Arizona Supreme Court, in an unusual split decision, denied review by a vote of 3 to 2. *Hoskinson v. State of California*, ___ P.2d ___ (1991). App.18 No reasons were given for the majority's view, but the two dissenting justices specifically suggested that this Court review the decisions that the majority felt dictated the dismissal of the case. (App. 20) Those justices concluded that application of this Court's decisions in the circumstances of this case resulted in a denial of due process to the plaintiffs who realistically have no other functional or convenient forum open to them. *See*, Cal.Govt.Code § 845.8, *supra* p. 3; *and see*, e.g. *Martinez v. State*, 149 Cal.Rptr. 519, 85 C.A.3d 430, affirmed 100 S.Ct. 553, rehearing denied 100 S.Ct. 1285, 444 U.S. 277, 62 L.Ed.2d 481, rehearing denied 100 S.Ct. 1285, 445 U.S. 920, 63 L.Ed.2d 606 (1978). The three decisions in the Arizona courts are collected in the Appendix. Because review in the Arizona Supreme Court is discretionary, the petition for certiorari is sought in regard to the opinion of the Arizona Court of Appeals. U.S. Sup. Ct. Rule 13.1.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' conclusion that reckless and wanton misconduct, intentionally undertaken with full awareness of the possible consequences in an adjoining state is an insufficient preliminary predicate for the exercise of personal jurisdiction, is inconsistent with this Court's prior decisions and with the decisions of other courts.

The result reached by the court below is an extreme example of the conflicting results in the lower courts over the years regarding the application of the rule that stems from Justice Warren's opinion in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958), that personal jurisdiction must be founded upon "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." See, *infra*, pp. 18-21.

The question in this case is whether that "act" must in all cases be one directly intended to cause an effect in the forum state in contrast to being one which could be reasonably expected to cause such an effect. If subjectively determined direct intention is in every case required, then the court below was correct. If objectively reasonable expectation of an effect in the forum is a sufficient predicate for more searching inquiry into fundamental fairness, then the court below is wrong.

Until recently, this court appeared to be moving toward the development of an objective test. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85

L.Ed.2d 528 (1985), the Court canvassed the objectively determinable factors that would make unreasonable the assertion of personal jurisdiction. In addition, however, the Court appeared to recognize that the subjective intention to impact the forum state was almost always sufficient, in and of itself, and it cast a heavy burden upon defendants in such situations to demonstrate a high level of actual unfairness. Thus following the opinion in *Burger King, supra,* the objective purposeful availment test, designed to protect against the assertion of jurisdiction on the basis of "random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." (471 U.S. 462 at 474, 105 S.Ct. 2174 at 2183) appeared to be the necessary predicate for jurisdiction that justified inquiry into the overall fairness and reasonableness of the assertion of jurisdiction. On the other hand, subjective purposeful direction became a nearly always sufficient condition for the exercise of jurisdiction. In *Asahi Metal Industry Company, Ltd. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), however, this Court split deeply on what kind of "purposefulness" constituted a necessary, as opposed to sufficient, predicate for the assertion of jurisdiction. In the years following *Asahi* the lower courts, both state and federal, have reflected the conflict among the Justices of this Court and their rulings have evidenced considerable doctrinal disarray. *See, infra* pp. 18-21. The problems have not been limited to products liability actions or international problems such as those in *Asahi,* but rather have been applied across the range of cases in which interstate adjudicatory jurisdiction may be asserted.

This case is an ideal case for exploring that doctrinal problem and resolving the conflict that exists in the decisions. The meaning of "purposeful availment" has been the focal point of this litigation from the outset. All parties have been fully aware of its critical importance to this case throughout the substantial discovery and through briefing that has been undertaken. The appellate process has narrowed the issues in the case. The court below has made a tightly focused and clear predicate factual assumption, fully supported by the record, and precisely directed to the question left unanswered and confused by the three opinions in *Asahi*.[4] The judges below have divided on the point and some have specifically asked for this Court's assistance. (App. 20)

As the *Asahi* opinions reveal, there is no clearly established meaning to the concept of purposeful availment. On the one hand, Justice O'Conner's plurality opinion appears to adopt a view that requires a showing of subjectively intentional forum-directed conduct. Justice Brennan's plurality opinion appears to focus upon the defendant's objective awareness of the possibility that its conduct might have impact within the forum. Justice Stevens' separate opinion would adopt a balancing test that requires "a constitutional determination that is affected by the volume, the value, and the hazardous

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[4] While it has been suggested that *Asahi* does not apply in the domestic context or in the non-product liability context, it has not been so understood by the lower courts. Generally, the courts have taken *Asahi* to be this Court's latest word on the meaning of purposeful availment.

character of the components." (480 U.S. 102, 122, 107 S.Ct. 1026, 1038).

As might be expected, each opinion has its analogue in the lower state and federal courts both before and after *Asahi* as we will show in the following section of this petition. Petitioners assert that this state of doctrinal disorder is unnecessary and indeed inconsistent with the existing doctrine developed by a majority of this Court. This Court in *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980) made the point that the role of the Due Process Clause in the personal jurisdiction context was simply to allow informed decision making at the level of primary conduct[5] and it characterized the due process requirement as the existence of reasonable anticipation of litigation in the impacted forum. Several terms later in *Burger King Corp. v. Rudzewicz, supra*, this Court noted that the essence of "purposeful availment" is that the defendant's connection with the forum not be the result of "random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person."

Objective tests such as suggested in *Burger King* and *Volkswagen* have served well in other areas of procedural

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[5] "The Due Process Clause, by ensuring the 'orderly administration of the laws,' *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 159, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." (444 U.S. 286, 296, 100 S.Ct. 559, 567).

law where subjective inquiry has been found unnecessarily complicated and indeterminate. *See*, e.g.: *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), *Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 1095, 89 L.Ed.2d 271 (1986). Moreover, an objective standard functions much more efficiently in the special context in which jurisdictional decisions are made. We have noted below that the initial choice of a forum in interstate cases is often made with very limited information and under the pressure of statutes of limitation. Under those circumstances, "threshold" tests (such as purposeful availment has become) should as a matter of simple efficiency look to objective factors.

In the case at bar, the court below assumed that "the defendants should have foreseen or did foresee that Atwood would travel to Arizona and sexually assault a child here. . . . " (App.6) On that assumption the defendants, under an objective standard, anticipated or should have reasonably anticipated litigation here arising out of their failure to control Frank Jarvis Atwood and they could have regulated their primary conduct in a way that would have minimized the risk of such an eventuality. Indeed, the unambiguous common law, statutory and administrative regulatory obligation was to do exactly that for the precise purpose of protecting the public from Frank Jarvis Atwood and the danger he so clearly posed to children in his path. At a minimum, John McLean had a statutory obligation to arrest Frank Atwood when he became aware of his interstate travel. Cal. Penal Code § 3059, *supra*, p. 3. Atwood was in McLean's office and McLean knew the statutorily relevant facts when he intentionally chose to not arrest Frank Jarvis Atwood. His

was not an act of mere negligence – it was a direct violation of his statutory duty to arrest. But for that failure, the murder would never have occurred.[6] The defendants cannot claim surprise at their charge's arrival in Arizona under the circumstances and the due process predicate established by this Court in the *Volkswagen* case was therefore satisfied. By requiring subjective proof of "purposeful direction" however, the court below posed a virtually insurmountable threshold standard, particularly in the tort context. It did so recognizing that its view of the law excluded from interstate personal jurisdiction all non-intentional torts, even those based upon reckless and wanton misconduct as in the case at bar. (App. 9, footnote 4) It expressed the view that while that result might be unsound as a matter of law, this Court's decisions seemed to the majority to compel it.

Petitioners have continuously asserted that a reckless or wanton act intentionally undertaken with full awareness of the potential for disastrous consequences in an adjoining state is a sufficient predicate for inquiry into the interests of the forum state and the factors relating to reasonableness and fairness. In the interstate pollution context this Court has summarily affirmed personal jurisdiction in the place of the injury. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 311, 101 S.Ct. 1784, 1790, 68 L.Ed.2d 114, at note 5 (1981). This Court has also indicated its acceptance of the highly similar principle of reasonable expectations set forth in Section 37 of the

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[6] In the court below, the dissenting judge notes that were McLean an Arizona officer, his failure would be criminal. (App. 15)

Restatement of Conflict of Laws. *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). For good or ill, we live in a time when most human activity has an interstate, if not international dimension. A rule that removes accountability from a tortfeasor who knowingly and recklessly lets go a pernicious force, be it chemical, biological or human is one that requires strong justification. When that justification is wholly based upon the simple fact that the predictable consequence of the misconduct crosses a state line the rule deserves a careful and studied review by this Court.

Because the court below held that the decisions in *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980) and *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) required a predicate showing that the defendants purposefully "directed" Frank Atwood to Arizona the question of the fairness and reasonableness of jurisdiction were not evaluated.

Had the questions of fundamental fairness and reasonableness, the convenience of the forum and the substantive interests of the forum state been evaluated, as *World-Wide Volkswagen, supra*, allows, it is clear the assertion of jurisdiction would be upheld. Most of the witnesses regarding the murder and its subsequent harm are, of course, located in Arizona. The witnesses regarding fault are either defendants or employees of defendants and thus subject to process in the Arizona courts. Frank Jarvis Atwood is incarcerated in Arizona and the burden of producing him for trial in California is obviously great. The interests of the state of Arizona in keeping its courts open for redress of injuries within its borders is manifest.

See, e.g. Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984). Indeed, the notion of suit against a tortfeasor at the situs of the tort is so commonsensical and the preference for trial in the place of the injury so traditional, it is hard to imagine rejection of jurisdiction on grounds of fundamental fairness on these facts. Indeed, the defendants have never suggested in the proceedings below that such unfairness exists. The dissenting justices in the Arizona Supreme Court agreed. (App. 20)

Finally, the Arizona forum is the only one in which all defendants can be sued in a single proceeding. What is at stake here for defendants is not convenience or fundamental fairness but rather the use of procedural doctrine to avoid the merits and inquiry into "traditional notions of fair play and substantial justice."[7] The governmental defendants know that their victory in the California courts is certain under its immunity law. Cal.Govt.Code. § 845.8, *supra,* p. 3. The individual defendants know that without the most blameworthy of the joint tortfeasors before the jury their chance of victory is

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[7] We refer of course to the factors set forth by this Court in *World-Wide Volkswagen Corp. v. Woodsen,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980). The circuit courts have expanded upon those ideas and it is common to see a list such as has been developed in the 9th Circuit which looks at seven factors: the extent of purposeful interjection, the burden on the defendant to defend the suit in the chosen forum, the extent of conflict with the sovereignty of the defendant's state, the forum state's interest in the dispute, the most efficient forum for judicial resolution of the dispute, the importance of the chosen forum to the plaintiff's interest in convenient and effective relief, and the existence of an alternative forum. *See, e.g., F.D.I.C. v. British-American Ins. Co.,* 828 F.2d 1439, 1442 (9th Cir. 1987).

greatly enhanced. The effect of the lower court's decision is to award victory on the merits without reaching the merits. It does that by reference to a perceived duty to follow a version of the purposeful availment rule that, with all respect, we submit has never commanded a majority of this Court and under the circumstances certainly should not do so in this case.

It is impossible to fully evaluate the impact of the existing discord in doctrine, but even a cursory review of the current appellate cases must leave one with the strong impression that jurisdictional overreaching is not the problem. As the dissenting justices in the Arizona Supreme Court noted, the highly restrictive impact of the subjective "purposeful availment" test may in fact deny plaintiffs their right to a forum and raise another set of due process problems involving access to courts. (App. 20) That is particularly significant here because the petitioners have no other forum open to them in which all defendants can be sued. Petitioners urge the Court to grant the writ to make clear the role of the due process clause in this context and to remand this case for a considered inquiry into the factors relating to fairness and convenience that are of the essence in jurisdictional controversies.

II.

If the existing doctrine established by this Court precludes the assertion of jurisdiction here, that doctrine should be reconsidered.

If, on the other hand, there is a constitutionally mandated jurisdictional predicate called "purposeful availment" that means "intentional direction," this case presents this Court with the option of giving specific content to that requirement or abandoning it altogether.

In the following material, petitioners will refer to several decisions of United States District Courts. We are aware of the fact that such references normally are not of substantial interest in the certiorari practice. The jurisdictional problem in this case, however, is a problem that is predominately litigated in the trial courts and left there because the expense and delay involved in appellate litigation often forecloses review. Published opinions of district courts may therefore be of especial interest here and accordingly we have on occasion pointed to them as data in support of the practical effects of the doctrinal conflicts we will describe.

This Court's decision in *Asahi Metal Industry Company, Ltd. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) introduced no new confusion to this narrow body of law. Rather, it reflected the existing confusion and through that reflection exacerbated it. For example, some cases say that purposeful availment or direction is the ***"sine qua non"*** of in personam jurisdiction. *See, e.g. Theunissen v. Matthews*, 935 F.2d 1514, ___ (6th Cir. 1991). Thus, the failure to demonstrate purposeful availment in the subjective sense described in Justice

O'Conner's opinion will result in a rejection of personal jurisdiction without further inquiry. That is what happened in this case. At the same time, many cases make a finding of purposeful availment presumptive establishment of personal jurisdiction, *see, e.g Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 796 P.2d 189, 195 (1990), thus placing a heavy burden upon the defendant to demonstrate unreasonableness. *See, e.g., Sher v. Johnson*, 911 F.2d 1357, 1363 (9th Cir. 1990). The combined effect of those two lines of cases is to compress the doctrines of personal jurisdiction established after the decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) into a single test that looks to the defendant's state of mind and seeks to determine the purposefulness of the forum contact generated by the defendant. Indeed, several courts have recently referred to the *Shoe* doctrine as the "purposeful availment/minimum contacts" doctrine. *See, e.g. Fidelity State Bank and Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, ___ F.Supp ___, 1991 WL 116738, (p. 4, slip opinion) (D.Kan. 1991); *Paine Webber, Inc. v. Westgate Group, Inc.*, 748 F.Supp.115, 121 note 4 (S.D.N.Y. 1990); *Hughes v. Cabanas del Caribe Hotel*, 744 F.Supp. 788, 795 (E.D.Mich. 1990).

Another line of cases focusses upon objectively established "reasonable anticipation" language adopted in Justice White's opinion for the Court in *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed 490 (1980). Those cases reflect a view that more comfortably fits into Justice Brennan's *Asahi* opinion which focusses upon the defendant's objective awareness of possible contact with the forum, which in turns provides "fair warning" of the potential for suit arising out

of potential contact in the forum. *See, e.g., Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990); *English & Smith v. Metzger*, 901 F.2d 36 (4th Cir. 1990); compare, § 37 Restatement, Conflict of Laws 2d, comment a. Another set of cases adopts a balancing test akin to that proposed by Mr. Justice Stevens. *See, e.g., Waffenschmidt v. MacKay*, 763 F.2d 711, 723 (5th Cir. 1985) [weighing (1) the existence and degree of purposefulness with which the effect in that forum was created; (2) whether the defendant has other substantial contacts with the forum unrelated to the suit; and (3) the substantiality of the effect itself to determine jurisdiction]. *See also, O'Neil v. Picillo*, 682 F.Supp. 706 (D.R.I. 1988). Another case considers dangerousness in determining the strictness with which purposefulness will be weighed. *Lichon v. Aceto Chemical Company, Ltd.*, 182 Ill.App.3d 672, 538 N.E.2d 613 (1989). Finally, one recent case entirely rejects purposeful availment in the tort context. *McAleer v. Smith*, 715 F.Supp. 1153, 1157 (D.R.I. 1989). *And see, Bridge v. Invest America, Inc.*, 748 F.Supp. 948, 954 (D.R.I. 1990) [purposeful availment applies only to contract actions]. Some courts mix everything up and suggest that purposeful availment is a sufficient condition for the exercise of jurisdiction but it is not a necessary one. So long as jurisdiction is "reasonable" under the circumstances, jurisdiction can be found, even when purposeful availment is lacking. *Simmons Oil Corp. v. Holly Corp., supra.* Recent Ninth Circuit cases focus inquiry upon whether the defendant's conduct "allowed" the forum contact, a standard that would seem to allow jurisdiction in the case at bar. *Roth v. Marquez*, ___ F.2d ___, 1991 WL 148316 (9th Cir. 1991).

Many scholars have also noted the doctrinal disarray that has overtaken this small corner of the procedural world. *See, e.g.*, Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev. 257 (1990); Seidelson, *A Supreme Court Conclusion and Two Rationales that Defy Comprehension: Asahi Metal Indus. Co. Ltd. v. Superior Court of California*, 53 Brooklyn L. Rev. 563 (1987); Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 Duke L. J. 669 (1987). In the most recent article on the topic one of the leading young scholars in the field, Professor Wendy Collins Perdue of the Georgetown University Law Center, has written:

> Despite its apparent interest in the subject, the Court has been unable to develop a coherent doctrine. The result has been that every few years the Court's description of personal jurisdiction is inconsistent with its prior precedent (Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B. C. L. Rev. 529 (1991)

Lack of coherent doctrine is far from a simple matter of pure academic concern. The question of where to file a lawsuit is a practical decision made by lawyers on the basis of the most minimal information. Often the decision must be made under the press of statutes of limitation before the possibility of discovery can occur. Here a two-year statute of limitations would have expired before Frank Jarvis Atwood was brought to trial and the responsibility for the plaintiffs' injury reasonably clear. Thus the decision to file this case in Arizona, where the victim lived and the crime occurred, was wholly rational and reflected the real substantive interests that Arizona has in

this case. The practical effect of the doctrine of subjective purposeful availment, if in fact it was properly applied here, is to place upon a plaintiff the burden of guessing about what discovery will show the defendants' state of mind to be. Indeed, the burden placed upon the plaintiffs by the doctrine articulated by the court below is even more burdensome because it requires the plaintiffs to demonstrate a jurisdictional factual element, "purposeful direction," that is more stringent than the proof regarding state of mind that is required to establish the tort itself. Requiring the plaintiff to prove intentional direction toward the forum state as predicate to any inquiry of any kind into fundamental fairness seems, therefore, inconsistent with our constitutional adjudication tradition because it applies enhanced standards of review to an ordinary question of due process. Certainly, as in the case at bar, the rigid application of the doctrine of purposeful availment prevents the State of Arizona from protecting its own obviously substantial interest in providing a forum for civil vindication of a crime committed within its boundaries to its own citizen. *See, e.g. McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

For all of those reasons, petitioners submit that the time has come to reconsider the doctrine of purposeful availment and perhaps the meaning of "minimum contacts" as well. Professor Perdue's article surveys the various academic approaches that have been proposed to correct the problems that have surfaced. Some years ago, Professor Louise Weinberg of the University of Texas suggested that strict constitutional scrutiny of jurisdictional decisions be abandoned and the Court return to the

basic due process standard that has emerged in the choice of law area. *See,* Weinberg, *Choice of Law and Minimal Scrutiny,* 49 U. Chi. L. Rev. 440, 469 (1982). Cases such as *Allstate Insurance Company v. Hague,* 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) and *Sun Oil Co. v. Wortman,* 486 U.S. 717, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) demonstrate that due process protections can be afforded without the complexities of strict scrutiny. Petitioners ask that the writ be granted in order to reconsider the standards that should be used to determine jurisdiction under the doctrine of *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

III.

The State of California is not a "person" entitled to invoke the individual liberty interests protected by the doctrines of personal jurisdiction developed under the due process clause. As a State of the Union charged with recklessly and wantonly causing pernicious effects beyond its territorial boundary, its protections against litigation in an adjoining state must be found in other consititutional rules such as the principles of cooperative federalism implicit in the full faith and credit clause.

One of the defendants below is the State of California in its governmental capacity. It has total immunity from domestic suit in California and for that reason suit against the State of California can be brought only in Arizona. The Arizona courts would plausibly allow the application of Arizona law, which does not recognize immunity when the action of the responsible state official is wanton or reckless as alleged here. *Baroldy v. Ortho Pharmaceutical Corp.,* 157 Ariz. 574, 760 P.2d 574 (Ariz.App. 1988). *See,*

also, Opinion of Judge Hathaway, App. 12. That choice of law issue is not before this Court, however. What is before this Court is the question of whether the State of California is entitled in its governmental capacity to claim the personal liberty protections of the Fourteenth Amendment's due process clause to defeat the assertion of personal jurisdiction over it. The court below held that it was entitled to do so because the State of Arizona was a "person" within the meaning of the Fourteenth Amendment. This result is inconsistent with the plain language of the amendment, the historical context in which it was proposed and adopted, and the clear intendment of the drafters. Moreover, the inclusion of a state as a Fourteenth Amendment "person" is not congruent with the prior statements of this Court in other contexts, *see, e.g. Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976); the square holdings of state courts, *see, e.g. Struebin v. State*, 322 N.W.2d 84, 86-87 (Iowa 1982), and the implications of the holding of this Court in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). This is not a case where Congress has directed pursuant to its power under some other provision of the Constitution that states be treated as other jural persons. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989).

Unique to the Fourteenth Amendment is its specific focus upon protecting the individual from unfair state actions. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948). The Amendment by its terms and

obvious intent distinguishes between "persons" and "state[s]." It is a corruption of that deliberate design to allow the amendment to be used to protect a state ***qua*** state from having to account for its extra-territorial torts against an individual. The state of California is, of course, entitled to constitutional protection. But in the context of this case, other clauses such as the Full Faith and Credit Clause and the Commerce Clause provide that protection. The principles of cooperative federalism noted in *Nevada v. Hall*, 440 U.S. 410, 422, 99 S.Ct. 1182, 1190, 59 L.Ed.2d 416 (1979), will protect the sovereign interests of the State of California while at the same time allowing consideration of Arizona's manifest interest in provision of a forum to its injured resident, *McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). Because the court below did not allow even a preliminary inquiry into the legitimacy of the forum's manifest interests, petitioners ask that this Court issue the writ to determine the correctness of the lower court's application of the Fourteenth Amendment to protect the State of California from accountability for its extra-territorial torts.

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to review the decision of the Court below.

Respectfully submitted,

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

VICKI LYNNE HOSKINSON through the personal representative of her estate, ROBERT FLEMING; DEBORAH JANE CARLSON, individually and as surviving parent of VICKI LYNNE HOSKINSON and GEORGE GLENN CARLSON, JR., husband and wife; STEPHANIE DAWN HOSKINSON by her next friend and mother, DEBORAH JANE CARLSON; CARIE LYNN CARLSON by her next friend and father, GEORGE GLENN CARLSON; BRIAN WILLIAM CARLSON by his next friends and parents, DEBORAH JANE CARLSON and GEORGE GLENN CARLSON, JR., Plaintiffs/Appellants, v. STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS, a State Agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN, individually and in his official capacity, and JANE DOE McLEAN, husband and wife; Members of the CALIFORNIA BOARD OF PRISON TERMS, individually and in their official capacities;	2 CA-CV 90-0048 DEPARTMENT A OPINION FILED DEC 13 1990

JOHN ATWOOD and ALICE ATWOOD, husband and wife; FRANK JARVIS ATWOOD, a single man,

Defendants/Appellees.

RODNEY PAUL HOSKINSON, individually and as surviving parent of VICKI LYNNE HOSKINSON, deceased,

Plaintiffs/Appellants,

v.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF CORRECTIONS, a State agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN and JANE DOE McLEAN, husband and wife; MEMBERS OF THE CALIFORNIA BOARD OF PRISON TERMS, individually and in their official capacity; JOHN ATWOOD and ALICE ATWOOD, husband and wife,

Defendants/Appellees.

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY

Cause Nos. 235942 & 235944 (Consolidated)

Honorable James C. Carruth, Judge

AFFIRMED

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and

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LIVERMORE, Presiding Judge.

Frank Jarvis Atwood, a California parolee, kidnapped, sexually abused, and murdered Vicki Lynne Hoskinson in Tucson in September 1984. He was convicted of his crimes and sentenced to death. Vicki Lynne's parents brought this wrongful death suit against

Atwood's parents, his parole officer, the State of California and various California agencies. The theory of the suit was that the defendants knew or reasonably should have known that Atwood was extraordinarily dangerous, that he had travelled through Arizona and might do so again, and that he was imminently likely to engage in sexual violence against a child. Had the defendants exercised reasonable care, it is argued, Atwood's parole would have been terminated or he would have been controlled in some other way and the murder would not have occurred. Plaintiffs appeal from a dismissal of their complaint for lack of personal jurisdiction. They also appeal the trial court's denial of an award of fees, costs and sanctions under A.R.S. § 12-349 arising out of the defendants' improvident removal of this case to federal court. We affirm.

The plaintiffs assert three grounds for jurisdiction: specific jurisdiction, general jurisdiction, and jurisdiction by necessity. As to the first ground, relying on §§ 36[1] and 37[2] of the Restatement (Second) of Conflict of Laws (1971), plaintiffs contend that defendants are subject to jurisdiction in Arizona because, by their tortious failure to control Atwood in California, they either committed a tort in this state or engaged in conduct which they should reasonably have expected would cause an effect in this state. Even assuming the truth of plaintiffs' factual assertions, however, their jurisdictional conclusions fly in the face of the decisions of both the United States Supreme Court and the Arizona Supreme Court.

The core of plaintiffs' argument for specific jurisdiction is that the conduct of the defendants had the foreseeable consequence of injury in Arizona. As the Supreme

Court has made abundantly clear, however, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 566, 62 L.Ed.2d 490, 500 (1980). While foreseeability is not irrelevant, the Court explained that "the foreseeability that is critical to due process . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297, 100 S.Ct. at 567, 62 L.Ed.2d at 501. Put another way, the defendant must have "fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683, 706 (1977) (Stevens, J., concurring). This fair warning requirement is met

> if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984).

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 541 (1985). As Justice O'Connor wrote in *Asahi Metal Industry Co., Ltd v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92, 104 (1987), "[t]he 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully*

directed toward the forum State." (Citation omitted; emphasis original.)

As our supreme court noted in *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 273, 736 P.2d 2, 7 (1987), "if a defendant purposefully directs its activities at a particular forum, and the effects of its activities are reasonably foreseeable, jurisdiction is proper because the defendant can reasonably anticipate being called to account for its own actions." As this statement implies, however, and as the supreme court has reiterated, foreseeability of the effects of one's conduct is not alone sufficient.[3] The defendant must also have *purposefully* directed his conduct or activities at the forum state. In the present case, even assuming that the defendants should have foreseen or did foresee that Atwood would travel to Arizona and sexually assault a child here, there has been no showing of any kind that the defendants' conduct with respect to Atwood was in any way purposefully directed toward Arizona. Accordingly, the assertion of specific jurisdiction in Arizona would violate due process.[4]

Plaintiffs seek to avoid this result by arguing as to California that it is not a person within the meaning of the Fourteenth Amendment and is therefore not entitled to due process. Accordingly, they argue, the cases requiring minimum contacts for purposes of acquiring jurisdiction are simply inapposite. For this proposition, they cite two cases arising in very different contexts and not addressing due process, *Will v. Michigan Department of State Police*, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) and *Pennsylvania v. New Jersey*, 426 U.S. 660, 96

S.Ct. 2333, 49 L.Ed.2d 124 (1976). Moreover, this construction would mean that any state could be sued in any other state on any claim and would constitute a massive intrusion on traditional notions of federalism. Because *Chavez v. State of Indiana,* 122 Ariz. 560, 596 P.2d 698 (1979), required that due process tests be met to obtain personal jurisdiction over a state, and no case has held the contrary, we reject the argument.

Plaintiffs also contend that general jurisdiction may be asserted over the defendant State of California because its contacts with this state are so routine and continuous apart from the present case that it should be treated as doing business here. As a general proposition, general jurisdiction may be asserted over a nonresident defendant who has substantial or continuous and systematic contacts with the forum state whether or not related to the subject matter of the lawsuit. *Helicopteros Nacionales de Columbia, S.A. v. Hall, supra; Batton v. Tennessee Farmers Mut. Ins. Co., supra.* However, we have been cited to no decision, nor found any, upholding the assertion of general jurisdiction by one state over another. While *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), makes it clear that one state may be sued in the courts of another when specific jurisdiction is asserted, nothing in that case suggests that the courts of one state are free to assert jurisdiction over another state regardless of whether the subject of the suit involves activities of the defendant state directed at the forum state. The restrictions on jurisdiction arising out of the Due Process Clause "are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla,* 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283, 1296 (1958). To

hold that one state may assert general jurisdiction over another would obliterate that limitation, as well as the status of states as "coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292, 100 S.Ct. at 564, 62 L.Ed.2d at 498. Accordingly, we reject the claim of general jurisdiction.[5]

Finally, it is argued that Arizona might have "jurisdiction by necessity" because "all three defendants could not be sued together in a single forum." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. at 419 n. 13, 104 S.Ct. at 1874 n. 13, 80 L.Ed.2d at 414 n. 13. All defendants here could be sued in California; the doctrine, therefore, does not apply. It is invoked not because of the inability to obtain jurisdiction but rather because Arizona law is more favorable to recovery. Preference is not necessity.

As a separate issue, the plaintiffs contend that the trial court erred in denying an award pursuant to A.R.S. § 12-349(A)(3) for the improvident removal of the action to federal district court. That court has already decided the issue adversely to the plaintiffs, and its decision is res judicata.

Affirmed.

/s/ Joseph M. Livermore
JOSEPH M. LIVERMORE,
Presiding Judge

CONCURRING:

/s/ Michael A. Lacagnina
MICHAEL A. LACAGNINA, Judge

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[1] Section 36 provides in pertinent part:

> (1) A state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any cause of action in tort arising from the act.

[2] Section 37 provides:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

[3] In *Chavez v. State of Indiana*, 122 Ariz. 560, 596 P.2d 698 (1979), a suit arising out of a child's murder in Arizona by a former inmate of an Indiana mental institution allegedly negligently released two years earlier, our supreme court suggested that foreseeability of harm in Arizona might be sufficient to confer specific jurisdiction. In light of the subsequent decisions in *World-Wide Volkswagen*, *Burger King*, *Asahi*, and *Batton*, we believe this portion of the decision is no longer the law.

[4] The dissent is a protracted jury argument largely based on a disagreement with the immunity provided California parole authorities by California statutes. The tests for personal jurisdiction do not change based on the more advantageous content of the forum state's law. If personal jurisdiction exists in this case, it ought to exist in any case where negligent conduct in one jurisdiction has foreseeable consequences in another. Perhaps that should be the law. So far, it is not.

[5] Because of our disposition of this issue, we do not address the remaining issues raised by plaintiffs concerning comity and discovery limitations.

HATHAWAY, J., Dissenting.

The United States Supreme Court has not addressed the specific jurisdictional issue before us, that is, whether due process permits a state's regulatory interest to be asserted over a defendant whose grossly negligent failure to control a dangerous, multiple child molester and parole violator from another state causes foreseeable harm in the forum. This matter comes before us on summary judgment entered in the trial court. If a genuine issue of material fact appears, the summary judgment should be reversed.

A little girl was kidnaped, sexually abused and murdered in Arizona, allegedly as a consequence of the combined conduct of Atwood, his parents and the gross negligence of a parole officer in California who failed to arrest or control Atwood, a newly-paroled, high risk, mentally disordered, sex offender. The officer possessed reports of at least five separate parole violations, several of which showed Atwood had left California. The parole officer failed to act, contrary to the strict supervision requirements of the Parole Procedures Manual and the California Penal Code §3059, which specifically mandate arrest when a parolee has left the state. This failure to act was in the face of Atwood's classification by the State of California upon his impending release as a "high risk" parolee who required special supervision. One California parole officer testified that it is the practice of Los Angeles agents not to arrest parolees merely for leaving the state. This is in violation of the California Penal Code and is the functional equivalent of intentionally allowing parolees to roam into other states with impunity.

During the four-month period after Atwood's release on parole and before the murder, he was literally "out of control," was addicted to cocaine and speed, was using a wide variety of other illegal drugs, was looking for children to molest, had told a friend that he would kill his next victim, was failing to attend counseling sessions, was carrying a weapon, and was traveling around the states of California, Arizona, New Mexico, Oklahoma and Texas, in violation of his parole and California statutes. Atwood's parents and McLean, his parole officer, had actual knowledge of some of those activities and ignored their duty to find out about the others. For example, police officers in Enid, Oklahoma offered to communicate information to several California agencies – three prisons, the Los Angeles Police Department, and McLean. No one replied to the two urgent teletypes sent several weeks prior to the murder; no one tried to control Atwood's illegal activities. It would appear obvious to any reasonable person, and particularly to a specially-qualified "high risk" parole officer such as McLean, that Atwood's pattern of crime would imminently recur. He had been deemed not subject to rehabilitation.

Atwood's parents, and especially parole officer McLean, should have been profoundly alarmed by Atwood's conduct in violation of parole. The only reasonable response to that knowledge would have been to take Atwood into immediate custody and control. Yet the only person who took action was a police officer from Enid, Oklahoma, whose repeated messages to California authorities were ignored until after the murder had occurred. When the California parole officers discovered that Atwood had been arrested by the FBI in Texas, they

retroactively canceled his parole, which was the first significant act of control exercised by any of the defendants during his four-month spree.

Arizona allows a legal remedy, A.R.S. §§12-820.02 and 41-621(I), when the alleged gross negligence of a parole official results in harm to an Arizona resident. California specifically disallows this remedy, Cal. Govt. Code §845.8.

It is one thing to protect interstate commerce and individuals' due process rights by denying personal jurisdiction over out-of-state tortfeasors absent intentional and meaningful contacts with the forum state, World-Wide Volkswagen Corp., supra. It is quite another to use this rationale to deny legal recourse to those who suffer injury because of gross negligence having clearly foreseeable and grave consequences across a state line. A number of Arizona cities are closer to Los Angeles than the cities of northern California, both in distance and in meaningful contacts.

Arizona's regulatory interest is circumscribed by choice-of-law doctrine as reflected in the Restatement (Second) Conflict of Laws (1988 Revisions). Section 24 states that the underlying principle is "reasonableness." Section 37 deals with the Hoskinson situation, and provides that a state may exercise personal jurisdiction when the defendant "causes effects in the state by an act done elsewhere . . . unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." Thus §37 concentrates not only on the defendant, as does the "purposeful availment" doctrine, but also on the effects of the act in the

forum state. The comments state that the causing of effects by itself is not a sufficient basis for jurisdiction, but that several factors should be considered: (1) totality of contacts; (2) nature and quality of effects; and, (3) intention and foreseeability. All three factors are significantly present in the instant case.

The first is implicated, the two states being contiguous, sister states within a community of states. Dumping of parole violators, or a lackadaisical attitude of no responsibility of sister states in dealing with or failure to deal with a mobile criminal population, must not be countenanced. The Restatement, §24, comment *a*, defines relationship in its broadest sense, not limited to economic contacts but including "all physical and non-physical circumstances which may serve to link a person with a state." Contiguity alone is not a substitute for "purposeful availment," of course, but merely a component of one of the three factors.

As to the second, the "effect" at issue was a serious crime against an Arizona resident. The Restatement gives the example of a person who explodes dynamite close to the border of a contiguous state, causing injury within that other state. Other examples might include the strict liability required of owners of wild animals whose escape causes injury or damage,[1] or noxious chemicals which poison the air across the border. In such instances, the issue becomes failure to control, rather than intent. In inherently dangerous situations intent is irrelevant.

The third factor, foreseeability, also has no absolute requirement of intent. Rather, foreseeability is established if the act "could reasonably have been expected" to cause

effects within the other state. Certainly a good faith argument can be made that the California officials should have anticipated the strong possibility of crimes in Arizona from a dangerous parole violator who had left the state from Los Angeles. Defendants, by grossly negligent or intentional failure to control a known and extraordinarily dangerous child molester, should be required to bear the risk that he will cause horrendous injury within a reasonable territorial range of activity.

The Supreme Court has already used the "effects" test of §37 to decide a personal jurisdiction issue, Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). The Ninth Circuit used it in Brainerd v. Governors of University of Alberta, 873 F.2d 1257 (9th Cir. 1989), finding intent because the out-of-state defendant responded to two phone calls and one letter sent to him from Arizona.

The Arizona Supreme Court used §37 to decide Chavez v. State of Indiana for Logansport State Hosp., 122 Ariz. 560, 596 P.2d 698 (1979), a failure to control case factually similar to this one. The court concluded that the defendants could not reasonably have foreseen a murder in Arizona two years after release. In the present case, the court should also apply §37, but come to the opposite conclusion on foreseeability, because the facts are stronger. The period of time between release and the murder was not two years, but four months; the killer was not a mental patient released in good faith, but a parole violator for whom state law mandated arrest; the earlier killer was out of touch with family and state officials during the two years after his release, whereas the latter had already been labelled "dangerous," had told a friend he

intended to kill a child, and had been in close contact with his family, who allegedly collaborated in his parole violation. The issue is not the simple negligence of *Chavez*, but intentional nonfeasance or gross negligence in violation of the California Penal Code. See A.R.S. §38-443 (public officer who knowingly fails to perform any duty required by law is guilty of nonfeasance.)

The majority's decision relies on a single test for personal jurisdiction – "purposeful availment" – and gives it preeminence over all other considerations, although the Restatement (Second) Conflict of Laws recognizes other factors to be weighed, as previously discussed. The Supreme Court's recent decision in Burnham v. Superior Court, ___ U.S. ___, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), ignored the petitioner's plea of lack of "minimum contacts" and asserted personal jurisdiction over him; "purposeful availment" was not a factor. In McAleer v. Smith, 715 F.Supp. 1153, 1157 (D.R.I. 1989), the court insightfully noted in discounting the applicability of the purposeful availment doctrine to tort claims:

> Tortfeasors are at odds with the privileges, benefits, and protections of local laws. Therefore, *jurisdictional determinations in tort cases focus on the causal link between the forum contact and the allegedly tortious act.* (Emphasis added.)

Appellants cite numerous cases in which "purposeful availment" is moderated or even bypassed. O'Neil v. Picillo, 682 F.Supp. 706 (D. R.I. 1988), is particularly instructive. It involved thousands of barrels of volatile, toxic wastes which defendants in one state gave to an intermediary which dumped them in another state. The court used "common sense" (i.e., reasonableness) to find

that, "[a]s other courts have recognized, . . . where a defendant deals in such inherently dangerous products, a lesser showing than is ordinarily required will support jurisdiction." O'Neil, 682 F.Supp. at 714, n.1.

There is even doubt whether the State of California parole board and parole officers, in their official capacities, have any personal jurisdiction defense under the fourteenth amendment's due process clause, which protects "persons." Will v. Michigan Department of State Police, 491 U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), held that neither a state nor state officials acting in their official capacities are persons for purposes of 42 U.S.C. §1983, which implements §5 of the fourteenth amendment. Much of the reasoning came from dictionary definitions of "person" from the time the fourteenth amendment was adopted which arguably pertains also to its due process clause. See State v. Cochise County, 73 Ariz.Adv.Rep. 3 (11/1/90) (state is not a person in context of county claims statute). Even though *Will* was actually resolving an eleventh amendment issue, the fact is that the jurisprudence of personal jurisdiction is enormously complicated and not reducible to a single, predicate test. See C. A. Wright & A. R. Miller, Federal Practice and Procedure, Civil 2d, §1073 (1987).

Arizona should assert its regulatory interest in this case and take jurisdiction, it appearing, at the least, that gross negligence, if not intentional nonfeasance, is clearly at issue with catastrophic effects in Arizona. The immunity California conferred upon itself for such conduct should not be visited upon Arizona residents. Unaccountability breeds irresponsibility, a standard that Arizona

has rejected. That neither California nor the federal government has seen fit to afford a remedy to a problem created by an arrogant bureaucracy should not leave Arizona victims remedyless in the name of serving federalism, nor should common sense and justice be frustrated.

If the law says that victims of a highly-dangerous, out-of-state parole violator cannot find redress in their home state against his grossly negligent keepers, I find myself concurring with Mr. Bumble: If the laws says that, then the law is "a ass."[2] For the reasons given, I would reverse the summary judgment.

/s/ James D. Hathaway
JAMES D. HATHAWAY,
Judge

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[1] Appellants point out that "[o]ne cannot defend a suit for damages caused by an uncontrolled vicious animal by claiming it was the 'unilateral' act of the animal . . . The law is clear . . . that the damage is proximately caused by the failure to control and the animal is not the source of independent, intervening cause." See Dobbs, Keaton & Owen, Prosser & Keeton on Torts §76 (5th ed. 1984).

[2] Charles Dickens, *Oliver Twist*, Chapter 51.

SEAL

SUPREME COURT OF ARIZONA

VICKI LYNNE HOSKINSON through the personal representative of her estate, ROBERT FLEMING; DEBORAH JANE CARLSON, individually and as surviving parent of VICKI LYNNE HOSKINSON and GEORGE GLENN CARLSON, JR., husband and wife; STEPHANIE DAWN HOSKINSON by her next friend and mother, DEBORAH JANE CARLSON; CARIE LYNN CARLSON by her next friend and father, GEORGE GLENN CARLSON; BRIAN WILLIAM CARLSON by his next friends and parents, DEBORAH JANE CARLSON and GEORGE GLENN CARLSON, JR., Plaintiffs/Appellants, vs. STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS, a State Agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN, individually and in his official capacity, and JANE DOE McLEAN, husband and wife; Members of the CALIFORNIA BOARD OF PRISON TERMS, individually and in their official Capacities; JOHN ATWOOD and ALICE ATWOOD, husband and wife; FRANK JARVIS ATWOOD, a single man, Defendants/Appellees.	Supreme Court No. CV-91-0030-PR Court of Appeals No. 2 CA-CV 90-0048 Pima County Nos. 235942 and 235944 (Consolidated) ORDER FILED JUL - 9 1991

RODNEY PAUL HOSKINSON, individually and as surviving parent of VICKI LYNN HOSKINSON, deceased,

Plaintiffs/Appellants.

vs.

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF CORRECTIONS, a State agency; CALIFORNIA BOARD OF PRISON TERMS; ROBERT McLEAN and JANE DOE McLEAN, husband and wife; MEMBERS OF THE CALIFORNIA BOARD OF PRISON TERMS, individually and in their official capacity; JOHN ATWOOD and ALICE ATWOOD, husband and wife,

Defendants/Appellees.

The Petition for Review came before the court at conference on June 11, 1991. On consideration,

IT IS ORDERED that the Petition for Review is denied. Vice Chief Justice Feldman and Justice Cameron voted to grant for the following reasons:

The exercise of *in personam* jurisdiction is based on considerations of due process and on principles of "fundamental fairness." *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 824 (1990). The court of appeals thus concludes that it is fundamentally unfair and would thus violate due process for Arizona to assert jurisdiction over the instant case.

Our view is quite the opposite. This tort occurred in Arizona, the victim resided in Arizona, and her family are residents of Arizona. The alleged tortious conduct would foreseeably cause the very harm that occurred in Arizona.

Given modern conditions, it is difficult to see why it is unfair to require these defendants to answer and defend in Arizona. Logistics certainly present no greater difficulty for the governmental defendants and even the individual defendants to appear and defend in Tucson than in Yreka, Riverside, or Azusa. It is no longer necessary to send counsel instructions via Wells Fargo. The telephone, the facsimile machine, and the photocopier answer the logistical problems as easily for lawsuits pending in Arizona as those in Imperial County, California. Law firms capable of handling cases such as this practice on a national and regional basis, and defendants will not be deprived of competent counsel even if forced to respond in Arizona.

Depriving these victims of a forum to redress their grievances is a greater violation of due process than compelling the defendants, whose conduct may have caused this tragedy, to defend themselves in Arizona. Reality tells us that it is time to reexamine some of our previous conclusions, even those in so recent a case as *Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268, 736 P.2d 2 (1987). If this is not possible under the current decisions of the United States Supreme Court, then, with all due respect, we suggest that the time may have come for that Court to reconsider the issue. However, as Judge Hathaway points out in his dissent, we

cannot be sure the Supreme Court's decisions require dismissal of this action for lack of personal jurisdiction.

We would grant review.

Dated this 9th day of July, 1991.

/s/ Frank X. Gordon, Jr.
FRANK X. GORDON, JR.
Chief Justice

Record returned to the Court of Appeals, Division Two, Tucson, this 9th day of July, 1991.

RE: VICKI LYNNE HOSKINSON et al vs. STATE OF CALIFORNIA, et al;
RODNEY PAUL HOSKINSON, et al vs. STATE OF CALIFORNIA, et al
Supreme Court No. CV-91-0030-PR
Court of Appeals No. 2 CA-CV 90-0048
Pima County Nos. 235942 and 235944 (Consolidated)
ORDER
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TO:

Winton Woods, Jr., Esq.

Gonzales & Villarreal, P.C. – ATTN: Elizabeth C. Peasley, Esq.

Haralson, Kinerk & Morey, P.C. – ATTN: Dale Haralson, Esq., and Gregory G. Wasley, Esq.

Lewis and Roca – ATTN: John P. Frank, Esq., Steven Labensky, Esq., and Anne Rachel Aberbach, Esq.

Bury, Moeller, Humphrey & O'Meara – ATTN: David C. Bury, Esq.

Slutes, Sakrison, Even, Grant & Pelander, P.C. – ATTN: John Pelander, Esq.

Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two, Tucson

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ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge:
JAMES C. CARRUTH
Court Reporter: None

CASE NO. 235942
DATE March 13, 1989

VICKI LYNN HOSKINSON, et al., ( )

Plaintiffs, ( )

-vs- ( )

STATE OF CALIFORNIA, et al., ( )

Defendants. ( )

EVENT SUMMARY

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MINUTE ENTRY

UNDER ADVISEMENT RULING ON MOTIONS TO DISMISS:

Pending are a Motion to Dismiss on jurisdictional grounds brought by defendants John and Alice Atwood, residents of California and parents of defendant Frank Jarvis Atwood, and a similar motion brought by the defendants State of California, California Department of

Corrections, California Board of Prison Terms, and certain individual employees and agents of the State of California (hereinafter "the California defendants").

No dispute has been raised respecting the jurisdiction of Arizona Courts over the defendant Frank Jarvis Atwood arising from the atrocities alleged to have been committed here against plaintiffs' decedent, Vicki Lynn Hoskinson, and indeed a liability determination against that defendant has already been made. The motions now in question are brought by the remaining defendants, all of whom assert that the Courts of Arizona lack jurisdiction to entertain the claims which Plaintiffs have brought against them.

Each of the motions to dismiss questions whether assertion of *in personam* jurisdiction in Arizona Courts over the Atwood parents and the California defendants complies with the requirements of Arizona's Long-Arm Statute (Civil Rule 4(E)(2)) and the requirements of the United States and Arizona constitutions respecting due process and traditional notions of fair play and substantial justice. Additionally, the motion of the California defendants raises principles of sovereign immunity and comity.

Having now considered the matter, this Court is of the opinion that each of the motions is well-taken and that a finding of *in personam* jurisdiction in Arizona would require a departure from existing law which would be inappropriately made by a trial court.

What follows below is a summary of this Court's analysis.

The parties have engaged in substantial, if not unlimited, discovery procedures. The evidence now available suggests that plaintiffs can show that defendant Frank Jarvis Atwood, in mid-September, 1984, viciously abducted, molested and murdered Vicki Lynn Hoskinson in Tucson, Arizona, some 4 months following his release from the California State Prison System. At that time, the evidence would indicate that his parents and the California defendants were aware of his criminal history dating back to 1971, which history included 5 imprisonments, parole supervision on 3 occasions, and probationary supervision on 5 occasions. The record would also suggest that defendant Frank Jarvis Atwood was known by his parents and the State of California to have serious problems associated with substance abuse and sexual deviancy which he had failed to confront and correct despite the considerable intervention and assistance of many parole and probation programs and their related therapy and counseling. While it might be that California's statutory length-of-confinement guidelines required Atwood's release on parole in May, 1984, it was clear then that he would be a high risk to recidivate and would require close parole supervision. The parole supervision plan then adopted by the State of California was supposed to accomplish such supervision but was arguably inadequate and did not accomplish its purpose. At that time, Frank Jarvis Atwood was 28 years old, was emancipated from his parents who, though long suffering, had no control over his actions. It is noted that prior to the tragic events in Tucson which culminated in the death of Vicki Lynn Hoskinson, John Atwood had told Frank Atwood's parole officer, Mr. Robert McLean, about Frank

Atwood's violation of parole conditions, and that the Atwood parents were unable to control him and were unwilling to provide a home for him. The Atwood parents also requested that the California authorities take their son back into custody for various parole violations. At that point, however, the whereabouts of defendant Frank Jarvis Atwood were unknown and were not to be learned until he was arrested in Kerrville, Texas, following the tragic abduction and murder here in Tucson.

Does the available evidence suggest that the Atwood parents and the California defendants "caused an event to occur" in Arizona (Rule 4(E)(2) AR Civ. P) so as to make it appropriate that they be subject to suit in Arizona? The current state of the law seems to require a negative answer.

For purposes of the motions, the Court assumes that no showing can be made that any of the movants have engaged in the kind of "substantial, continuous and systematic" contacts with the State of Arizona which are required to give the Courts of this State "general" jurisdiction over them. *See* e.g., *Helicopteros, Burger King* and *Batton*. Whether "specific" jurisdiction may be maintained here depends upon whether the facts in this case establish the existence of necessary "minimum contacts" which would justify an Arizona Court in determining that the conduct of the Atwood parents and of the California defendants is such as to make it reasonable for them to anticipate being haled into court in Arizona for actions of Frank Jarvis Atwood. In addition to aspects of foreseeability, however, such defendants must also be

found to have "purposefully availed" themselves of contacts with Arizona which would entitle them to the benefits and protections of Arizona's law. *See Hanson v. Denckla, Burger King* and *Batton*. It seems to this Court that there simply is no such evidence to support a finding of purposeful availment that would support jurisdiction in this case over either the Atwood parents or the California defendants. No contacts have been shown, let alone "minimum contacts."

With respect to the California defendants' additional arguments concerning sovereign immunity and comity, this Court concludes that *Nevada v. Hall* does not here apply to support jurisdiction because there is no indication that Arizona would be allowed to, in any manner, control or review the exercise of government responsibilities by the State of California, and because there is nothing to indicate that California took any direct action in Arizona with regard to Frank Jarvis Atwood. The "parolee cases" involving intentional placement of parolees in sister states are found to be inapposite.

With regard to the comity question, it is noted that Mr. Frank's argument on behalf of the California defendants seemed to invite suit in the State of California. It appears to be the law in Arizona that notions of comity should allow the State of California the deference and mutual respect to determine the operation of its parole system because of the importance of that operation to California's own system of government. Also, it seems that the courts of California should be given the opportunity to resolve the troublesome constitutional issues associated with the California statute which proports to deny liability to non-residents for torts inflicted by the

State of California or its agents while allowing for compensation for such torts to California residents.

For the foregoing reasons,

IT IS ORDERED that the Motions to Dismiss are GRANTED. The dismissals are to be without prejudice.

Mr. Pelander and Mr. Frank are requested to prepare appropriate forms of dismissal orders for the Court's signature.

cc: Haralson, Kinerk & Morey – Dale Haralson, Esq.
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Gonzales & Villarreal – Elizabeth Peasley-Fimbres, Esq.
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Under Advisement Clerk
Hon. James C. Carruth

Jackie Haag
Deputy Clerk